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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EUEL ALLEN,) Case No. 09-2507 SC
Plaintiff,)
v.) MEMORANDUM OF DECISION,
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
UNITED FINANCIAL MORTGAGE CORP.;)
ALLIANCE BANCORP; MORTGAGE)
ELECTRONIC REGISTRATION SYSTEMS,)
INC.; CALIFORNIA RECONVEYANCE CO.;)
GMAC MORTGAGE; JP MORGAN CHASE)
BANK; INVESTORS MORTGAGE AND)
REALTY; and DOES 1 through 25,)
inclusive,)
Defendants.)

I. INTRODUCTION

This case concerns two loans obtained by Plaintiff Euel Allen ("Plaintiff" or "Allen") in 2006 that were secured by separate deeds of trust encumbering his personal residence. ECF No. 29 ("FAC") ¶ 6. Allen filed this suit in May 2009 following the initiation of non-judicial foreclosure proceedings against his home, located at 5701 Morse Drive, Oakland, California ("the Morse Drive Property" or "the Property"). See id. Against Defendant JP Morgan Chase Bank ("Chase"), Allen alleged fraud in the origination and servicing of the loans, violations of the Truth in Lending Act ("TILA"), and violations of the Real Estate Settlement Procedures Act ("RESPA"). Id. Against Defendant California Reconveyance

1 Company ("CRC"), Allen alleged violation of the Fair Debt
2 Collection Practices Act ("FDCPA"). Id. The remaining named
3 defendants, with the exception of Mortgage Electronic Registration
4 Systems, Inc. ("MERS"),¹ were not served and have not appeared in
5 this action. ECF No. 64 ("Pl.'s Trial Br.") at 2.

6 On March 22, 2010, the Court granted in part and denied in
7 part a motion to dismiss filed by Chase and CRC. ECF No. 41 ("Mar.
8 22, 2010 Order"). The Court dismissed Plaintiff's RESPA claim,
9 dismissed Plaintiff's TILA claim for damages, and dismissed
10 Plaintiff's fraud claim to the extent it alleged fraud in the
11 origination of the loans. Id. at 14-15. Accordingly, Plaintiff
12 has three remaining claims: (1) rescission under TILA against
13 Chase; (2) fraud by Chase in the servicing of Plaintiff's loans;
14 and (3) violation of the FDCPA by CRC. Id.

15 The Court held a one-day bench trial on August 29, 2011. The
16 Court, by this Memorandum of Decision, issues its findings of fact
17 and conclusions of law pursuant to Rule 52(a) of the Federal Rules
18 of Civil Procedure. For the reasons set forth below, the Court
19 concludes that the evidence does not support Plaintiff's claims and
20 accordingly enters judgment in favor of Defendants Chase and CRC.

21

22 **II. FINDINGS OF FACT**

23 1. Allen has been employed as a delivery truck driver
24 since approximately 2005. Allen Test.² He is currently on a
25 medical leave of absence recovering from shoulder surgery. Id. He

26 ¹ MERS was served and has appeared in this action. However, the
27 FAC alleges no claims against MERS. See FAC.

28 ² Allen was the only witness who testified at trial. The parties
stipulated to the admissibility of all exhibits.

1 intends to resume work as a truck driver in approximately three
2 months. Id.

3 2. In 2003, Allen inherited the Morse Drive Property
4 upon the death of his father. Pl.'s Ex. 1 ("Trust Transfer Deed");
5 Allen Test. Allen has resided at the Property intermittently for
6 the past thirty-five years. Allen Test. It is currently his
7 primary residence. Id.

8 3. From the time he inherited the Property until October
9 2006, Allen's monthly mortgage payment was \$1,088.30. Pl.'s Ex. 2;
10 Allen Test.

11 4. In October 2006, Allen received a phone call offering
12 him the opportunity to refinance his home. Allen Test. Allen
13 accepted the offer to refinance and obtained two loans ("the
14 loans") secured by separate deeds of trust against the Morse Drive
15 Property. Id.

16 5. The first loan was in the amount of \$448,000 and was
17 secured by a deed of trust identifying United Financial Mortgage
18 Corporation ("United Financial") as the lender. Defs.' Ex. 503
19 ("First DOT"). The second loan was in the amount of \$56,000 and
20 was secured by a deed of trust listing Alliance Bancorp as the
21 lender. Defs.' Ex. 504 ("Second DOT"). Both deeds identified
22 First American Title as the trustee, and Mortgage Electronic
23 Registration Systems, Inc. ("MERS"), acting solely as a nominee for
24 the lender, as the beneficiary.

25 6. Allen used approximately \$300,000 of the loan money
26 to pay off the existing mortgage on the Property. Allen Test. He
27 used between \$50,000 and \$100,000 to pay his deceased father's
28

1 outstanding medical bills. Id. He also used a portion of the
2 money to make repairs to the Property. Id.

3 7. At the time he obtained the loans, Allen believed
4 that the loans carried a low, fixed interest rate. Allen Test.
5 His initial monthly payment was approximately \$1,200. Id.

6 8. The deed of trust for the \$448,000 loan provided for
7 an "adjustable rate balloon rider." Defs.' Ex. 503. Allen
8 testified that he did not read the deed of trust before signing it
9 and that he did not understand what an "adjustable rate balloon
10 rider" was at the time. Allen Test.

11 9. After consummation of the loans, United Financial and
12 Alliance Bancorp each sold their interests in the loans to
13 Washington Mutual Bank ("WaMu"). FAC ¶ 17; ECF No. 44 ("Defs.'
14 Ans. to FAC") ¶ 17.

15 10. On October 24, 2007, Allen received a letter from
16 WaMu informing him that the interest rate on his "adjustable
17 mortgage loan" would increase as of December 1, 2007, and that his
18 new monthly payment would be \$1,217.76. Pl.'s Ex. 7; Allen Test.

19 11. In April 2008, Allen received a letter from WaMu
20 informing him that if he continued to pay only the minimum amount
21 due each month his monthly payment would rise to \$3,409.02
22 effective October 2008. Pl.'s Ex. 8; Allen Test.

23 12. On May 20, 2008, Allen wrote a letter to WaMu
24 explaining that he could not afford an increase in his monthly
25 payments, expressing his desire for a loan modification, and
26 expressing outrage that the terms of his loan provided for such a
27 sharp increase. Pl.'s Ex. 9. He received no response. Allen
28 Test.

1 13. On September 25, 2008, Chase entered into a Purchase
2 and Assumption Agreement ("PAA") with the Federal Deposit Insurance
3 Corporation, pursuant to which Chase acquired certain of WaMu's
4 assets, including WaMu's interest in Allen's loans. Defs.' Ex. 508
5 ("PAA").

6 14. In October 2008, Allen received a letter from Chase
7 informing him that Chase had acquired the servicing rights to his
8 loans from WaMu but that future correspondence would continue to
9 take place under the name WaMu. Pl.'s Ex. 11; Allen Test.

10 15. In October 2008, Allen ceased making monthly
11 payments on his loans. Allen Test. He again contacted Chase to
12 request a loan modification. Id.

13 16. Between October 2008 and October 2009, Plaintiff
14 corresponded with Chase numerous times via telephone, fax, and
15 mail, in an attempt to obtain a loan modification. Allen Test.;
16 see also, e.g., Pl.'s Ex. 14 (Nov. 2008 Letter from Allen to Chase
17 requesting modification); Pl.'s Ex. 15 (Letter from WaMu informing
18 Allen of "homeowner assistance program"); Defs.' Ex. 510 (Chase
19 correspondence log). He received numerous letters stating that his
20 application was incomplete and requesting additional or updated
21 financial information. E.g., Pl.'s Ex. 19 (letter from WaMu
22 requesting additional proof of income); Pl.'s Ex. 30 (letter from
23 WaMu requesting updated financials). Each time, he sent the
24 requested information via fax and certified mail. Allen Test;
25 Pl.'s Ex. 16 (letter from Allen to Chase providing financial
26 documentation for loan modification application); Pl.'s Exs. 17
27 (certified mail receipt), 18 (fax cover sheet).

28 17. During this time period, Chase personnel called

1 Plaintiff and his NID-Housing Counseling Agent Renee Tucker on
2 numerous occasions to discuss the status of his modification
3 request. Defs.' Ex. 510 (Chase correspondence log). On many of
4 these occasions, Chase was unable to reach Plaintiff or his agent.
5 Id.

6 18. On January 8, 2009, Allen received a letter from
7 Jack Mullins ("Mullins") of the WaMu Homeownership Preservation
8 Team informing him that WaMu records indicated he had inquired
9 about a loan modification. Pl.'s Ex. 23. The letter stated that
10 Mullins would review the information Allen had submitted, evaluate
11 modification options, and contact Allen within forty-five days
12 regarding the request. Id. The letter also stated

13 This letter is not an approval by WaMu of a
14 loan workout plan. During the review period,
15 default servicing will continue, including
16 collection and foreclosure activity. If you
17 payoff, reinstate or agree to a repayment plan
18 while we are reviewing your loan modification
request, then you will have withdrawn your
request for a loan modification, we will
consider your inquiry cancelled and will take
no further action to process your request.

19 Id.

20 19. Foreclosure proceedings against the Property began
21 in January 2009. On January 22, 2009, a Notice of Default and
22 Election to Sell Under the (First) Deed of Trust was recorded with
23 the Alameda County Recorder's Office. Defs.' Ex. 507 ("NOD"). The
24 NOD indicated that the amount in arrears was \$17,608.14. Id. A
25 copy of the NOD was also posted on Allen's front door. Allen Test.
26 Also on or about January 22, 2009, MERS assigned all beneficial
27 interest in the First DOT to LaSalle Bank NA as trustee for
28 Washington Mutual Mortgage Pass-Through Certificates WMALT Series

1 2007-OA2. Defs.' Ex. 505. LaSalle Bank NA then substituted CRC as
2 trustee of the First DOT. Defs.' Ex. 506. CRC then issued a
3 Notice of Trustee's Sale providing that the Property would be sold
4 at a public sale on May 13, 2009. Pl.'s Ex. 37.

5 20. On March 2, 2009, Allen wrote a letter to Mullins.
6 He stated in part that he did not understand why Mullins' January
7 8, 2009 letter informed him that foreclosure proceedings would
8 continue while his request for a modification was reviewed but that
9 if he made any payment in the meantime his request for modification
10 would be cancelled. Pl.'s Ex. 29.

11 21. In March 2009 and again in May 2009, Allen received
12 letters from WaMu asking him to provide additional financial
13 information to complete his application for loan modification.
14 Pl.'s Exs. 30, 35.

15 22. In October 2009, Allen received a letter from
16 WaMu/Chase informing him that he may qualify for a "Home Affordable
17 Modification Trial Period Plan." Allen Test.; Defs.' Ex. 513. The
18 plan called for Allen to make three trial monthly payments of
19 \$2,425.80. Id. at 10. The letter provided that Allen could enroll
20 in the trial payment plan by returning a signed copy of the plan,
21 documentation of hardship and income, and a check for the first
22 trial payment. Id. at 1. The letter provided that if Allen
23 returned the required documentation, Chase would review it to
24 determine whether he qualified for the federal government's Home
25 Affordable Modification Program ("HAMP"). If he made the three
26 trial plan payments and Chase determined that he qualified for
27 HAMP, then Chase would modify his loan. Id. The letter also
28 provided that if Allen complied with the terms of the trial plan,

1 Chase would not pursue foreclosure during the trial plan period.

2 Id.

3 23. Allen did not accept the trial period plan offer
4 because he could not afford the trial payment amount. Allen Test.
5 On November 12, 2009, Allen contacted Chase and advised that he
6 could not afford the trial plan payments. Defs.' Ex. 510.

7 24. In response to the Court's inquiry, counsel for both
8 parties agreed that Chase was under no legal obligation to offer
9 Plaintiff a loan modification, and that the trial payment plan
10 offered to Plaintiff was part of a program voluntarily initiated by
11 Chase.

12 25. Allen concedes that he is not currently able to
13 tender the balance of the loans minus interest and penalties.
14 Allen Test.

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16 **III. CONCLUSIONS OF LAW**

17 **A. TILA Claim for Rescission**

18 TILA imposes several disclosure requirements on lenders of
19 consumer loans and their assignees. Generally, the law requires a
20 lender to disclose, among other things, the amount financed, the
21 total finance charge, the finance charge expressed as an annual
22 percentage rate, the sum of the amount financed and the finance
23 charge ("total of payments"), and the number, amount, and due dates
24 of payments scheduled to repay the total of payments. See 15
25 U.S.C. § 1638. In his FAC, Plaintiff alleges that the TILA
26 disclosures he received were untimely and inaccurate. FAC ¶¶ 13-
27 15. He further alleges that upon acquiring Plaintiff's loans,
28 Chase learned of and concealed these TILA violations. Id. ¶ 30.

At trial, Plaintiff sought to rescind the loan because of the alleged TILA violations.³ The equitable goal of rescission under TILA is to restore the parties to the "status quo ante." Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003). Accordingly, the Ninth Circuit has held that a trial court may condition rescission under TILA on the debtor's ability to tender the loan principal. Id. at 1170-72; see also Bustamante v. First Fed. Sav. & Loan Ass'n, 619 F.2d 360, 365 (5th Cir. 1980) (creditor's TILA obligations were not automatically triggered until obligor tendered repayment).

Plaintiff presented no evidence at trial regarding whether he received or did not receive the disclosures required by TILA. Moreover, Plaintiff conceded that he has not made and cannot make a tender offer to repay Chase the amount owed minus finance charges and penalties. Thus, because Plaintiff has failed to prove that Chase violated TILA at all, and because he has admitted that he cannot tender the remaining loan principal, the Court finds against Plaintiff on his claim for rescission under TILA.

B. Claim for Fraud in the Servicing of the Loan

Plaintiff alleges that Chase engaged in fraud in the servicing of his loan. FAC ¶¶ 52-53. In order to prove fraud, Plaintiff must prove: (1) a false representation of a material fact; (2) knowledge of the falsity (scienter); (3) intent to induce another into relying on the representation; (4) reliance on the representation; and (5) resulting damage. Ach v. Finkelstein, 264 Cal. App. 2d 667, 674 (1968). The Court finds that Plaintiff has

³ As noted above, Plaintiff's TILA claim for damages was dismissed as untimely in the Court's March 22, 2010 Order.

1 failed to prove that Chase made any false representations of
2 material fact.

3 It is unclear precisely what fraudulent acts Plaintiff
4 contends were committed by Chase in the servicing of the loans.⁴
5 At trial, Plaintiff emphasized the letter he received from Mullins,
6 which informed Plaintiff that he should not make payments while his
7 loan modification was being reviewed even though foreclosure
8 proceedings would continue during the review process. See FF ¶ 18.
9 While Plaintiff understandably testified that he was confused by
10 this statement, he presented no evidence that the statement was
11 false or that it was made with the intent to defraud Plaintiff.

12 More generally, Plaintiff's counsel argued in closing that
13 Plaintiff relied to his detriment on Chase's repeated
14 representations that modification of his loan might be possible,
15 when in fact Chase had no intention of modifying the loan.
16 However, Plaintiff presented no evidence that Chase's
17 representations regarding the possibility of a loan modification
18 were false. To the contrary, Chase offered Plaintiff a trial
19 payment plan that, if completed, may have resulted in a permanent
20 loan modification. This suggests that Chase's representations that
21 a modification may be possible were sincere.

22 There is no doubt that Chase was disorganized in its
23 communications with Plaintiff, that the process of approving or
24 denying Plaintiff's request for a loan modification proceeded at an
25 alarmingly slow rate, that Chase's representatives often failed to
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27 ⁴ The more specific fraud allegations in Plaintiff's FAC alleged
28 fraud in the origination of Plaintiff's loans. FAC ¶¶ 50-52. The
Court dismissed all claims of fraud pertaining to loan origination
in its March 22, 2010 Order.

1 respond to Plaintiff's inquiries, and that this conduct was deeply
2 upsetting to Plaintiff as he sought to prevent the loss of the home
3 he inherited from his father. However, while Chase's conduct in
4 the handling of Plaintiff's loan was far from exemplary, Plaintiff
5 has failed to show it was fraudulent.

6 Accordingly, the Court finds that Plaintiff has failed to
7 prove his claim for fraud.

8 **C. Violation of the FDCPA**

9 The FDCPA seeks to eliminate "abusive, deceptive, and unfair
10 debt collection practices" by regulating the type and number of
11 contacts a debt collector can make with a debtor. See 15 U.S.C. §
12 1692. Plaintiff alleges that CRC violated the FDCPA because (1) it
13 lacked legal authority to collect on the loans; (2) it attempted to
14 collect more than the amount owed; and (3) it failed to properly
15 "validate the debt" as required by the FDCPA. FAC ¶ 60. At trial,
16 Plaintiff's counsel did not indicate what, if any, evidence
17 purportedly supports these allegations, and the Court finds none.

18 First, Defendants presented the Assignment of Deed of Trust by
19 which MERS assigned all beneficial interest in the First DOT to
20 LaSalle Bank NA, Defs.' Ex. 505, and the Substitution of Trustee
21 through which LaSalle Bank NA then substituted CRC as trustee of
22 the First DOT, Def. Ex. 506. The evidence thus shows that CRC was
23 properly substituted as trustee and therefore possessed legal
24 authority to foreclose on the Property.

25 Second, no evidence was presented showing that CRC attempted
26 to collect more than the amount owed. The Notice of Trustee's Sale
27 indicated that the amount Plaintiff owed under the First DOT had
28 actually increased from \$448,000 to approximately \$521,000. Pl.'s

1 Ex. 37. Plaintiff admitted that he ceased making monthly loan
2 payments in October 2008, and as of January 2009 Plaintiff was in
3 arrears in the amount of \$17,608.14. Defs.' Ex. 507. Therefore,
4 the evidence does not support Plaintiff's claim that by attempting
5 to foreclose on the Property CRC was attempting to collect more
6 than the amount owed.

7 Third, Plaintiff presented no evidence that CRC failed to
8 provide a debt validation notice as required by the FDCPA. The
9 FDCPA provides that, within five days of making initial contact
10 with a debtor "in connection with the collection of any debt," a
11 debt collector must send the debtor a written notice containing the
12 amount of the debt; the name of the creditor; the time period in
13 which the validity of the debt may be challenged; and instructions
14 explaining how the debtor may obtain further evidence of the debt
15 and information about the creditor. 15 U.S.C. § 1692g(a).
16 Plaintiff presented no evidence as to whether CRC provided him with
17 a debt validation notice, and if so, when the notice was provided
18 and whether it conformed to the requirements of section 1692g(a).

19 Accordingly, the Court finds that Plaintiff has failed to
20 prove his claim for violation of the FDCPA.

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1 || IV. CONCLUSION

2 For the foregoing reasons, the Court enters judgment in favor
3 of Defendants JP Morgan Chase Bank and California Reconveyance
4 Company on Plaintiff Euel Allen's claims for fraud, violations of
5 the Truth In Lending Act, and violations of the Fair Debt
6 Collection Practices Act.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: September 2, 2011

Samuel J. Morris
UNITED STATES DISTRICT JUDGE